In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-6041

CARLESS RUSSELL BARNHILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court's instructions to the jury were inaccurate and confusing, that the evidence was insufficient to support his conviction, that his warrantless arrest was not based upon probable cause, and that his consent to a search by government agents was not voluntary.

After a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted of possessing an unregistered still, non-taxpaid distilled spirits, and containers intended for use in an illegal distillery operation, operating a distillery business without bond, and fermenting mash on premises other than an authorized distillery, in violation of 26 U.S.C. 5601(a)(1), 5179(a), 5601(a)(4), 5173, 5222, 5601(a)(7), 5604(a)

(1), and 5686(a). He was sentenced to concurrent terms of three years' imprisonment on each of four counts and one year's imprisonment on the fifth count. The court of appeals affirmed by order (Pet. App. A1).

From October 22, 1973, to October 28, 1973, United States Treasury Agents maintained intermittent surveillance of an unregistered still located adjacent to petitioner's residence (Tr. 7-8). At 5:45 a.m. on October 28, 1973, Special Agents Moore and Jones were observing the site of the unregistered still from a distance of 60 yards (Tr. 8). From what the agents could hear and see, they determined that the still was in operation at that time (Tr. 8-9). At approximately 6:30 a.m., petitioner's dog began barking at the agents and petitioner came out of his residence (Tr. 9). Petitioner was walking toward the still when he was stopped by the agents and placed under arrest (Tr. 9). After being fully advised of his Fourth and Fifth Amendment rights (Tr. 9-10), petitioner consented to a search of his residence (Tr. 9-10, 28). A search of the residence and out building produced numerous plastic and metal containers (Tr. 39-40).

The agents then examined the still, which was located 49 steps from petitioner's residence (Tr. 8). The still was in dense underbrush and the only clear means of access was a path that began 23 steps from the residence (Tr. 12). Along the path to the still, the agents found 20 gallons of non-taxpaid whiskey in containers similar to those found in petitioner's house (Tr. 11, 39-40). At the still, the agents found a hose connection that was attachable to a similar section of hose leading to a faucet at petitioner's residence (Tr. 29), which provided the only water supply in the area (Pet. 17). The only other residence in the immediate vicinity was a mobile home aproximately 100 yards from the still (Tr. 24).

1. Petitioner contends (Pet. 13-15) that the district court's instructions to the jury were inaccurate and confusing.[1] Since he failed to object to the instructions before the jury retired (Tr. 72), however, he may not now challenge them. Fed. R. Crim. P. 30. In any event, the instructions were proper.

It was not necessary for the court to read the statutory definition of the term "distiller" (Pet. 13), because the common understanding of the term and its meaning in the context of this case were clear. See *United States* v. *Sexton*, 473 F.2d 512 (C.A. 5) ("distilled spirits"). Nor did the court improperly instruct the jury concerning the proof of intent necessary for conviction under 26 U.S.C. 5686(a). That section does not require that the property "intended for use" in violating the statute be intended for use by the individual charged with possessing it. The court correctly charged that "the essential elements of that particular offense are first the possession by the defendant of the jugs as described in the indictment, second, that the defendant had knowledge that the jugs were intended to be used as containers for distilled spirits produced in violation of the law" (Pet. App. A5). See 2 Devitt and Blackmar, *Federal Jury Practice and Instructions* § 56.18 (1970). The court's reference to "Jack Daniel and George Dickel" (Pet. App. A3, A4) was intended to give the jury a concrete concept of an authorized distiller and was not confusing.

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[1]The relevant portions of the instructions are set forth at Pet. App. A2-A5.

2. Petitioner's challenge to the sufficiency of the evidence to support his conviction (Pet. 16-18) is insubstantial. The evidence summarized above, together with all reasonable inferences that may be drawn from it, viewed in the light most favorable to the government (*Glasser* v. *United States,* 315 U.S. 60, 80), was plainly sufficient to permit the jury to find petitioner guilty beyond a reasonable doubt.

3. Petitioner contends (Pet. 18-20) that there was insufficient probable cause to justify his warrantless arrest. The agents, confronted with an unregistered still in full operation, accessible only by a path that led to petitioner's isolated residence, clearly had "facts and circumstances within their knowledge * * * sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense" (*Beck* v. *Ohio,* 379 U.S. 89, 91).

4. Petitioner's final contention (Pet. 20-22) is that his consent to the warrantless search of his residence was involuntary. After the agents on the scene asked another agent by radio to obtain a search warrant for petitioner's premises, petitioner told the agents that a warrant was unnecessary. The agents advised petitioner of his right to require a warrant and told him that any evidence discovered could be used against him. Petitioner then voluntarily consented to the search (Tr. 9-10, 28). Petitioner was not directly or indirectly coerced into giving his consent to the search. His consent was given without prompting by the agents and with a full understanding of his rights; it was therefore free and voluntary. *Schneckloth* v. *Bustamonte,* 412 U.S. 218.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.